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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TECHFORWARD, INC.,) CASE NO. CV11-01313 ODW (JEMx)
Plaintiff,)
vs.) PLAINTIFF'S MEMORANDUM
BEST BUY CO., INC.,) OF POINTS AND AUTHORITIES
BEST BUY ENTERPRISE) IN SUPPORT OF AN AWARD OF
SERVICES, INC., and) PUNITIVE DAMAGES;
BEST BUY PURCHASING LLC,) [PROPOSED] ORDER
Defendants.)
Hearing Date: TBD
Time: TBD
Location: Courtroom 11

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1 **INTRODUCTION**

2 On November 16, 2012, a nine-person jury found Defendants liable for
3 misappropriation of TechForward’s trade secrets and breach of contract, and returned
4 a verdict of \$22 million in favor of TechForward. The jury also found by clear and
5 convincing evidence that Defendants (collectively referred to as Best Buy) committed
6 willful and malicious misappropriation, a finding that allows the Court to impose
7 exemplary damages of up to \$44 million. In reaching this conclusion, the jury
8 determined that Best Buy intended to cause injury and that its conduct was
9 “despicable” and done with a “willful and knowing disregard for the rights of others.”

10 The jury’s finding was justified. As shown at trial, Best Buy’s conduct fell
11 woefully short of basic standards of decency. After inviting TechForward to its
12 offices, in September 2010, under the pretext of partnering on a nationwide buyback
13 program, Best Buy induced TechForward to share its most confidential, proprietary,
14 and valuable trade secrets—information that Best Buy needed to develop its own
15 buyback program in time for the Super Bowl in February 2011. To gain
16 TechForward’s trust, Best Buy assured TechForward that it would abide by its
17 confidentiality obligations and use TechForward’s information *solely* for the purpose
18 of evaluating a potential partnership with TechForward. It also promised to erect a
19 brick wall to segregate employees working with TechForward from those working on
20 Best Buy’s own buyback program.

21 But Best Buy did not keep any of those promises. In breach of its contractual
22 obligations, and basic commercial ethics, Best Buy immediately began sharing the
23 information freely within the company. When it became clear that TechForward’s
24 information had value and that a national buyback program would “throw[] off tons of
25 cash,” Best Buy cast TechForward aside because it did not want to make TechForward
26 “rich” at its expense. Yet it continued to use TechForward’s trade secrets in dozens of
27 internal financial models that helped senior executives at Best Buy evaluate and
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1 eventually launch the national buyback program. On top of that, it brazenly passed
2 those trade secrets along to Best Buy’s insurer to help convince it to underwrite the
3 program.

4 What is more, Best Buy knew that what it was doing was wrong. Indeed, even
5 as it prepared to visit TechForward’s offices to extract more information, Best Buy
6 was aware of the potential legal consequences of its actions. And just days after
7 telling TechForward it did not want to partner together, Best Buy expressed concern
8 about the “extremely high” risk of litigation—a risk created by the fact that Best Buy
9 continued to use TechForward’s trade secrets even after Best Buy had terminated its
10 relationship with TechForward. Shortly thereafter, Best Buy tried to erase the
11 evidence of its misdeeds by deleting the name “TechForward” from its files—even as
12 it preserved, and continued to use, the trade secrets that formed the crux of the
13 financial models.

14 In the end, the jury correctly found that Best Buy stole TechForward’s trade
15 secrets, and that it did so willfully and maliciously. Such behavior deserves to be
16 punished in such a way to ensure that Best Buy will never commit such acts again.
17 While TechForward is entitled to up to \$44 million in exemplary damages as a matter
18 of law, TechForward does not seek the maximum amount of exemplary damages.
19 Instead, in an effort to be fair, balanced, and reasonable, TechForward maintains that
20 the precise nature of Best Buy’s conduct here, together with the applicable case law,
21 merits an award of no less than \$22 million in exemplary damages. Such an award is
22 one times the compensatory damages awarded—a multiple that is one-half the
23 maximum allowable under the law and well within the range of other awards that
24 California courts have granted for trade-secret misappropriation on similar findings of
25 willful and malicious behavior.

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1 **BACKGROUND**

2 On November 16, 2012, after a seven-day trial, a nine-person jury found that
3 Best Buy had improperly used TechForward's trade secrets. (D.E. # 198.) The jury
4 concluded that Best Buy's improper use of TechForward's trade secrets caused Best
5 Buy to be unjustly enriched in an amount of \$22 million. (*Id.*) In addition, the jury
6 found by clear and convincing evidence that Best Buy's improper use of
7 TechForward's trade secrets was willful and malicious. (*Id.*) After the jury verdict
8 was returned, the Court asked the parties to submit briefing on the proper amount of
9 exemplary damages to award.

10 **ARGUMENT**

11 Under CUTSA, if willful and malicious misappropriation exists, the Court may
12 grant exemplary damages up to twice the amount of any award for actual damages or
13 unjust enrichment. Cal. Civ. Code § 3426.3. To determine the proper measure of
14 exemplary damages, courts in California have looked to three factors: (1) the nature of
15 the misconduct; (2) the amount of compensatory damages; and (3) the defendant's
16 financial condition. *Mattel, Inc. v. MGA Entm't, Inc.*, 801 F. Supp. 2d 950, 953 (C.D.
17 Cal. 2011). Here, all three of the relevant factors weigh heavily in favor of imposing
18 on Best Buy exemplary damages of no less than \$22 million—a multiple of one times
19 the amount of compensatory damages that the jury awarded TechForward.

20 **A. Best Buy's Conduct Violated Basic Commercial Ethics.**

21 A review of the first factor in the exemplary damages analysis—the nature of
22 Best Buy's conduct here—leaves no doubt that TechForward is entitled to exemplary
23 damages of at least one times compensatory damages. The conduct need not be
24 criminal or fraudulent to justify a large exemplary damages award; even unethical
25 conduct that causes purely economic loss is sufficient to warrant substantial
26 exemplary damages. *Mattel*, 801 F. Supp. 2d at 954. For example, in *Mattel*, the
27 court awarded exemplary damages of one times compensatory damages for
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1 misconduct that was a “breach of basic commercial ethics.” *Id.* at 954-55.

2 Here, the jury unanimously found—by clear and convincing evidence—that
3 Best Buy misappropriated TechForward’s trade secrets willfully and maliciously. By
4 definition, such a result means that the jury found Best Buy’s behavior to be “not
5 reasonable under the circumstances at the time and . . . not undertaken in good faith,”
6 as well as undertaken either with “an intent to cause injury” or a “willful and knowing
7 disregard for the rights of” TechForward. (Trial Tr. 19:11-16 (Nov. 16, 2012) (Jury
8 Instructions, CACI 4411).) This finding alone is sufficient to impose the “maximum
9 possible amount in exemplary damages.” *02 Micro Int’l Ltd. v. Monolithic Power*
10 *Sys., Inc.*, 399 F. Supp. 2d 1064, 1079 (N.D. Cal. 2005).

11 The record evidence introduced at trial confirms that Best Buy’s actions fell far
12 short of commercially ethical standards and deserve to be punished in order to deter
13 Best Buy and others from similar conduct. In early 2010, Best Buy purchased
14 \$30 million dollars of advertising time for the upcoming 2011 Super Bowl. (Trial Tr.
15 84:25-85:13 (Nov. 8, 2012).) By late summer 2010, Best Buy saw massive potential
16 in a nationwide expansion of a guaranteed buyback program. (Trial Tr. 198:13-
17 199:10 (Nov. 13, 2012).) In August 2010, Best Buy decided that the new nationwide
18 buyback program would be the centerpiece of its Super Bowl advertising campaign.
19 (Trial Tr. 30:6-24 (Nov. 9, 2012).)

20 But Best Buy had a problem. Though it had committed to a national launch of a
21 buyback program, Best Buy knew that it would not be able to accomplish that task on
22 its own in time for the Super Bowl. (Trial Tr. 200:25-202:12, 205:5-207:6 (Nov. 8,
23 2012).) With the February 2011 deadline looming, Best Buy was under the gun and
24 needed a way to organize and launch a national buyback program. (*Id.* at 205:5-
25 206:3.) Its solution was TechForward, a small start-up company with a unique set of
26 capabilities and knowledge of buyback programs. (*Id.* at 204:3-10.) Unbeknownst to
27 TechForward, Best Buy had been interested in taking a “peek under the hood” at
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1 TechForward’s trade secrets since 2009 so it would not have to “invent its own”
2 model. (Trial Tr. 86:17-88:18, 91:3-19 (Nov. 14, 2012).)

3 So in late August 2010, Best Buy approached TechForward with an “urgent
4 proposal” regarding a potential national partnership. (Trial Tr. 57:25-58:14 (Nov. 8,
5 2012).) As part of those discussions, Best Buy asked TechForward to be as
6 “forthcoming and transparent as possible” and to share certain trade secrets relating to
7 the design and implementation of a buyback program in order to keep the process
8 moving. (*Id.* at 59:8-62:8.) Trusting that Best Buy would abide by its contractual
9 confidentiality obligations, TechForward disclosed its trade secrets to Best Buy. (*Id.*
10 at 59:8-62:8, 63:1-65:3.)

11 Best Buy quickly recognized the value of TechForward’s trade secrets: Kevin
12 Winneroski, a Vice President of Best Buy’s Secondary Markets group and “sponsor”
13 of the buyback expansion effort, told TechForward: “We have to use you guys to get
14 this done by 2011.” (Trial Tr. 146:2 (Nov. 13, 2012) (7/31/12 Deposition of M.
15 London 106:8-11).) Paul Dunn, Best Buy’s Senior Director of Finance, said that it
16 “could be a couple of years” before Best Buy would be able to develop a buyback
17 model comparable to TechForward’s—even if Best Buy were to license
18 TechForward’s infrastructure. (Trial Tr. 200:25-202:12 (Nov. 8, 2012).) In fact, he
19 was sure that Best Buy could not “organically duplicate” TechForward’s model on its
20 own. (*Id.* at 205:5-207:6.) Best Buy regarded TechForward’s trade secrets as crucial
21 to designing a buyback program. (Trial Tr. 38:21-23 (Nov. 9, 2012).) And Best Buy
22 did not have access to any of this information other than through TechForward. (Trial
23 Tr. 242:4-21, (Nov. 8, 2012); Trial Tr. 30:25-31:6, 35:21-39:10 (Nov. 9, 2012).)

24 Best Buy assured TechForward that TechForward’s trade secrets would be
25 maintained in confidence and restricted behind “firewalls.” (Trial Tr. 231:18-232:15
26 (Nov. 8, 2012).) Mr. Stephens even wrote an email confirming that Best Buy needed
27 to erect a “brick wall” between the team working with TechForward and the team
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1 working on Best Buy's own buyback program. (Trial Tr. 54:17-55:8 (Nov. 9, 2012);
2 PX 69.)

3 But Best Buy never erected any brick wall, and TechForward's trade secrets
4 were freely transferred within the company. (*Id.* at 56:8-57:4.) Indeed, the very same
5 day that Mr. Stephens received the trade secrets, he emailed them to his colleague Bill
6 Jordan. (Trial Tr. 47:14-50:17 (Nov. 9, 2012); PX 66.) Mr. Dunn, for his part,
7 admitted during his deposition that sending TechForward's trade secrets to David
8 Wass, his finance colleague who was working on Best Buy's internal buyback
9 program, went "against the spirit" of what TechForward had asked Best Buy to do.
10 (Trial Tr. 233:23-234:16, 235:18-236:4 (Nov. 8, 2012).) By blatantly disregarding the
11 promise Best Buy had made to erect a brick wall—not to mention the contractual
12 obligations it had undertaken in the February 2008 Confidentiality Agreement and the
13 April 2010 Operating Agreement—Best Buy committed a serious breach of basic
14 commercial ethics, which requires the imposition of substantial exemplary damages.
15 *See Mattel*, 801 F. Supp. 2d at 954.

16 Once Best Buy had TechForward's valuable trade secrets in hand, Best Buy felt
17 there was little incentive to partner with TechForward. Mr. Winneroski recognized
18 that a nationwide buyback program would "throw[] off tons of cash" and would be
19 "ridiculously accretive." (*See* Ex. 87; Trial Tr. 206:16-207:19 (Nov. 13, 2012).) And
20 Best Buy had no intention of letting the small start-up company get "rich" at Best
21 Buy's expense. (*See* Ex. 12; Trial Tr. 177:12-178:9 (Nov. 9, 2012).) Indeed, Best
22 Buy itself previously estimated that TechForward would receive \$20 million per year
23 in profits in a partnership with Best Buy. (*See* Ex. 81; Trial Tr. 195:6-197:11 (Nov. 8,
24 2012).)

25 Despite knowing that it intended to build its own buyback program, Best Buy
26 continued to take advantage of opportunities to examine TechForward's confidential
27 information—including by sending Mat Ingle and Mr. Stephens to visit
28

1 TechForward's offices in Los Angeles in late-September 2010. (Trial Tr. 176:16-19
2 (Nov. 9, 2012).) Remarkably, Mr. Stephens went to TechForward's offices even
3 though he had no intention of partnering with TechForward. (*Id.* at 177:1-10.) And
4 Mr. Ingle knew that visiting TechForward's offices could result in legal
5 "consequences" if Best Buy did not partner with TechForward to build its nationwide
6 buyback program. (*See* Ex. 369; Trial Tr. 173:25-176:7 (Nov. 14, 2012).) This sort
7 of trickery and deceit is the very conduct that courts consider when meting out a
8 punishment for willful and malicious misappropriation. *See Mattel*, 801 F. Supp. 2d
9 at 954. It is especially galling when it is targeted at a financially vulnerable party such
10 as TechForward. *Id.*

11 After Best Buy had taken all it needed from TechForward, it cut TechForward
12 loose without warning at a meeting on October 19, 2010. (Trial Tr. 81:21-82:11
13 (Nov. 8, 2012).) During the meeting, Best Buy indicated that the very same people
14 who had been working with TechForward on a daily basis would now be working on
15 Best Buy's national roll out of its own buyback program. (Trial Tr. 208:9-23 (Nov. 9,
16 2012).) With TechForward out of the picture, Best Buy continued to use
17 TechForward's trade secrets in a multitude of ways to further its own national
18 buyback program. Mr. Dunn admitted at trial that he incorporated TechForward's
19 trade secrets—down to the very structure and language of TechForward's cash reserve
20 model—in his own financial model for Best Buy's national buyback program:

21 Q. In fact, even after you decided not to enter into a business
22 relationship with TechForward, you continued to use their
information; correct?

23 A. We did.

24 (Trial Tr. at 215:11-21 (Nov. 8, 2012).) Mr. Dunn copied and used TechForward's
25 trade secrets a minimum of **twenty-four** times over six different versions of that
26 model. (*See* PX 54; PX 458 - PX 462.) Mr. Dunn also incorporated TechForward's
27 trade secrets into financial modeling that he did for a presentation that Mr. Winneroski
28

1 made to senior executives at Best Buy. (Trial Tr. 250:21-251:9, 252:1-4 (Nov. 8,
2 2012).) The purpose of that presentation was to convince them to go forward with the
3 national buyback program launch. (*Id.* at 253:22-254:15.)

4 Mr. Stephens likewise admitted that he used TechForward's trade secrets in
5 creating a separate financial model that was used to sign up Best Buy's underwriter,
6 Chartis. (Trial Tr. 61:18-21 (Nov. 9, 2012) (admitting that "the numbers that
7 TechForward gave [him] on exercise timing were a starting point for the model that
8 [he] and Mr. Wass put together").) Indeed, Mr. Stephens provided TechForward's
9 trade secret on exercise timing to a colleague so that it could be sent directly to
10 Chartis. (*See* Ex. 73; Trial Tr. 65:15-66:9, 67:15-24 (Nov. 9, 2012).) Even after he
11 was caught red-handed, Mr. Stephens insisted at trial that it was "pure coincidence"
12 that the exercise timing data that Best Buy provided to Chartis was *identical* to
13 TechForward's data. (*Id.* 66:10-67:14.) Repeated acts of blatant misappropriation
14 like these deserve the harshest punishment. *See Mattel*, 801 F. Supp. 2d at 954
15 (considering whether "the misconduct was repeated" as part of determining how
16 "reprehensible" the behavior was).

17 Throughout, Best Buy was acutely aware of its misconduct. Just ten days after
18 telling TechForward there would be no partnership, Best Buy *knew* it had done
19 something wrong. Mr. Winneroski stated in an internal email that it was best not to
20 speak about TechForward, as "the risk of litigation [was] extremely high." (Trial Tr.
21 211:11-212:18 (Nov. 13, 2012); PX 132.) Thereafter, Best Buy even tried to hide the
22 evidence of its misappropriation by removing the references to "TechForward" from
23 Best Buy's financial model; Best Buy, however, was careful *not* to delete
24 TechForward's data. (Trial Tr. 236:21-238:18 (Nov. 8, 2012); PX 89.) As a result of
25 this brazen misappropriation, Best Buy was able to launch its national buyback
26 program by February 2011 on the world's largest stage—the Super Bowl. The
27 national buyback program ran for 19 months, and Best Buy accumulated over
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1 \$140 million in revenues from its buyback program. (Trial Tr. 75:7-14, 76:19-77:12-
2 16 (Nov. 13, 2012).)

3 As the record makes clear, Best Buy’s behavior was malicious and fell far short
4 of commercial ethical standards. Such conduct is more than sufficient to warrant the
5 imposition of significant exemplary damages. The recent decision in *Mattel* is
6 directly on point. In that case, Mattel’s employees used “cheap fake business cards,
7 silly nicknames, and [other] amateurish tactics” to improperly acquire its competitors’
8 trade secrets. 801 F. Supp. 2d at 955. Mattel then distributed this information within
9 the company and used it to “preempt” the plaintiff’s new product offerings. *Id.* at 954.
10 Finding that this conduct was “silly, not evil,” Judge David O. Carter awarded
11 exemplary damages of \$85 million—one times the amount of compensatory damages.
12 801 F. Supp. 2d at 956.

13 Here, Best Buy’s conduct was more than just “silly”; it was corporate bullying
14 at its worst. Best Buy’s repeated use of TechForward’s trade secrets and willful
15 disregard of who had access to them justifies the Court in imposing a severe
16 punishment on Best Buy to send a message that such acts of willful and malicious
17 misappropriation will not be tolerated. The need for deterrence here is great. The
18 Best Buys of the world need to understand that their financial heft does not give them
19 license to take advantage of smaller companies like TechForward just because they
20 have “leverage” over them. (Trial Tr. 164:9-13 (Nov. 14, 2012).) To deter such
21 conduct in the future, Best Buy should be required to pay a substantial penalty of at
22 least one times the jury’s compensatory damages award.

23 **B. Exemplary Damages of No Less Than \$22 Million Is Warranted in
24 Light of the Compensatory Damages.**

25 The second exemplary damages factor—the relationship between the
26 compensatory damages award and the proposed exemplary damages—also warrants
27 an award of at least one times the compensatory damages. The Supreme Court of
28 California has held that compensatory damages and exemplary damages should share

1 a direct relationship. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr.
2 389, 582 P.2d 980 (1978). Applying this principle, the *Mattel* court rejected the
3 argument that compensatory damages and exemplary damages should share an
4 “inverse relationship” in the face of a large compensatory award. *Mattel*, 801 F. Supp.
5 2d at 955 (stating that “[b]oth parties agree that the [compensatory award of
6 \$85 million in unjust enrichment] was large,” but that “compensatory damages and
7 exemplary damages should share a direct relationship” and that “[t]he Court is aware
8 of no precedent that prohibits the doubling of this amount”).

9 Where, as here, there is a finding of willful and malicious misappropriation,
10 California state courts and federal courts in the Ninth Circuit routinely award
11 exemplary damages equal to ***two times*** the amount of compensatory damages. *See*,
12 *e.g.*, *02 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 399 F. Supp. 2d 1064, 1080
13 (N.D. Cal. 2005) (awarding punitive damages equal to 200% of compensatory
14 damages); *Merch. Transaction Sys., Inc. v. Nelcela, Inc.*, CV-02-1954, 2010 WL
15 1337711, at *9 (D. Ariz. Apr. 2, 2010), *aff'd*, 439 F. App'x 620 (9th Cir. 2011)
16 (same); *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930, 933 (9th Cir.
17 2004) (same).

18 Even those courts that do not award two times compensatory damages
19 commonly award substantial amounts of exemplary damages. *See, e.g.*, *Vacco Indus.,*
20 *Inc. v. Van Den Berg*, 5 Cal. App. 4th 34, 45, 6 Cal. Rptr. 2d 602, 607 (1992)
21 (awarding punitive damages equal to 113% of compensatory damages); *Mattel, Inc. v.*
22 *MGA Entm't, Inc.*, 801 F. Supp. 2d 950, 958 (C.D. Cal. 2011) (awarding punitive
23 damages equal to 100% of compensatory damages); *Maharis v. Omaha Vaccine Co.*,
24 967 F.2d 588 (9th Cir. 1992) (awarding punitive damages equal to 100% of
25 compensatory damages); *Eldorado Stone, LLC v. Renaissance Stone, Inc.*, 04-CV-
26 2562, 2007 WL 2403572, at *1-6 (S.D. Cal. Aug. 20, 2007) (awarding punitive
27 damages equal to 45% of compensatory damages).

1 Here, Best Buy deserves to be punished for its misconduct in an amount no less
2 than \$22 million. This is one times the amount of compensatory damages, which is
3 conservative when compared with what numerous California state courts and federal
4 courts in the Ninth Circuit have awarded for trade-secret misappropriation. And it is
5 an appropriate amount to punish Best Buy for its willful and malicious
6 misappropriation.

7 **C. Best Buy's Substantial Net Worth Justifies Exemplary Damages of at
8 Least \$22 Million.**

9 The final factor in the exemplary damages analysis—Best Buy's net worth—
10 also weighs heavily in favor of an award of exemplary damages of no less than one
11 times the \$22 million compensatory damages award. The Supreme Court of
12 California has declared that “deterrence will not be served if the wealth of the
13 defendant allows him to absorb [an exemplary damages] award with little or no
14 discomfort.” *Neal*, 21 Cal. 3d at 928. As a guideline in this area, the Supreme Court
15 of California has further stated that courts should award exemplary damages of up to
16 10% of a defendant's net worth. *See Storage Servs. v. Oosterbaan*, 214 Cal. App. 3d
17 498, 514–16, 262 Cal. Rptr. 689 (1989) (citing *Devlin v. Kearny Mesa
AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381 (1984)).

19 Here, Best Buy's revenues for fiscal year 2012 were over \$50 billion. (Trial Tr.
20 at 142:3-4 (Nov. 14, 2012); *see also* Best Buy Co., Inc. Annual Report on Form 10-K
21 for FY 2012, at 35.¹) According to Best Buy's Quarterly Report on Form 10-Q, as of
22 August 4, 2012, it had total assets of \$15.8 billion and liabilities of \$11.7 billion for a
23 total equity value of \$4.1 billion. (Best Buy Co., Inc. Quarterly Report on Form 10-Q
24 for Quarter Ending Aug. 4, 2012, at 3-4.²)

25 ¹ Available at <http://www.sec.gov/Archives/edgar/data/764478/000076447812000035/bby-201210k.htm>

26 ² Available at <http://www.sec.gov/Archives/edgar/data/764478/000076447812000093/bby841210q.htm>

An exemplary damages award of \$22 million is only 0.044% of Best Buy's revenue and only 0.5% of its equity value in 2012—which is well below the California Supreme Court's limit of 10% for exemplary damages. By way of comparison, in *Mattel*, Judge Carter's award of exemplary damages in the amount of \$85 million for trade-secret misappropriation was 3.6% of the defendant's net worth. Accordingly, an award of one times the amount of compensatory damages is perfectly reasonable, especially in light of Best Buy's net worth and its brazen and repeated use of TechForward's trade secrets.

CONCLUSION

For the reasons stated above, TechForward respectfully requests that the Court award TechForward no less than \$22 million in exemplary damages for Best Buy's willful and malicious misappropriation.

Dated: November 27, 2012

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